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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ARIK ELBERSE, BREANDAN DALTON, and
SEAMUS MACCONAONAIGH

Appeal 2008-2922
Application 09/707,015
Technology Center 2100

Decided¹: April 7, 2009

Before JOSEPH L. DIXON, LANCE LEONARD BARRY, and
ALLEN R. MACDONALD, *Administrative Patent Judges*.

DIXON, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

I. STATEMENT OF THE CASE

A Patent Examiner rejected claims 1-3 and 5-20. The Appellants appeal therefrom under 35 U.S.C. § 134(a). We have jurisdiction under 35 U.S.C. § 6(b). We reverse and enter a new ground of rejections pursuant to our authority under 37 C.F.R. § 41.50(b) under 35 U.S.C. § 101 and 35 U.S.C. § 112, second paragraph.

A. INVENTION

The invention at issue on appeal relates to a method of using a web-browser to pass information from a first web-entity to one of a plurality of second web-entities. (Spec. 1, ll. 4-5.)

B. ILLUSTRATIVE CLAIM

Claims 1, 10, 13, and 19 (copies of claims from the After-Final Amendment, filed Aug. 8, 2005, since the claims filed in the Appendix to the Brief are incorrect) which further illustrates the invention, follow:

1. A method of using a web-browser to pass information from one of a plurality of first web entities to a second web entity said web-browser being separate from said first and second web-entities and said one of a plurality of first web entities having no information about the second web entity, said method comprising the steps of:

- (i) receiving a pre-specified address of a redirection server, together with additional information, from the one of a plurality of first web entities at the web-browser;
- (ii) forwarding an address of the second web-entity to the redirection server from the web-browser such that the redirection server redirects the web-browser to the second web-entity and

(iii) passing the additional information from the web-browser to the second web-entity.

10. A web-based information system arranged to provide items of information for receipt by an information receiver, said web-based information system comprising:

(i) an input arranged to receive instructions from a web-browser such that an item of information from a database may be accessed and selected; said web-browser being separate from said web-based information system and said information receiver;

(ii) an output arranged to forward a pre-specified address of a redirection server together with an item of information accessed from the database to the web-browser; such that said web-based information system has no information about the information receiver.

13. A communications network comprising a web-based information system as claimed in claim 10.

18. A computer program for controlling a web server in order to redirect a web browser, said computer program being arranged to control the computer program such that:

(i) an address of a web-entity is received from the web-browser together with additional information said additional information having been obtained from a web-based information system which has no information about the web entity; said web-browser being separate from the web server, the web-entity and the web-based information system; and

(ii) a processor redirects the web-browser to the web-entity such that in use, the web-browser may send the additional information to the web-entity.

19. A method of using a web-browser to generate cookies for each of an information receiver, and a redirection server, said method comprising the steps of:

- (i) accessing the information receiver using the web-browser;
and
- (ii) automatically redirecting the web-browser to the redirection server.

C. REFERENCES

The Examiner relies on the following references as evidence:

Narendran	US 6,070,191	May 30, 2000
Kirsch	US 6,466,966 B1	Oct. 15, 2002

D. REJECTIONS

The Examiner makes the following rejections:

Claims 10 and 12-20 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Kirsch.

Claims 1-3, 5-9, 11, 16, 19, and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Kirsch in view of Narendran.

II. ISSUES

Has the Examiner made a *prima facie* case of anticipation and obviousness? Are the claims sufficiently definite to evaluate the merits of the prior art rejections? Do the claims set forth statutory subject matter under 35 U.S.C. § 101?

III. PRINCIPLES OF LAW

35 U.S.C. § 101

35 U.S.C. § 101 Inventions patentable.

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

It is now clear that the four categories of "process, machine, manufacture, or composition of matter" define the explicit scope and reach of patent eligible subject matter under 35 U.S.C. § 101. *See In re Nuijten*, 500 F.3d 1346, 1354 (Fed. Cir. 2007) ("If a claim covers material not found in any of the four statutory categories, that claim falls outside the plainly expressed scope of § 101 even if the subject matter is otherwise new and useful."). Thus, a "signal" cannot be patentable subject matter because it is not within any of the four categories. *Id.* at 1357. Similarly, a "paradigm" does not fit within any of the four categories. *In re Ferguson*, No. 2007-1232, slip op. at 11 (Fed. Cir. March 6, 2009).

A decision of the Federal Circuit in *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008) (en banc), reaffirmed or clarified several important principles regarding patent eligibility of "process" claims under § 101.

- (1) Not every series of steps is a "process" under § 101. *Id.* at 952 ("[T]he Supreme Court has held that the meaning of 'process' as used in § 101 is narrower than its ordinary meaning.").
- (2) Fundamental principles, such as "laws of nature, natural phenomena, and abstract ideas," are not patent eligible. *Id.* ("Specifically, the Court has held that a claim is not a patent-eligible 'process' if it claims

'laws of nature, natural phenomena, [or] abstract ideas. Such fundamental principles are 'part of the storehouse of knowledge of all men . . . free to all men and reserved exclusively to none.'" (Citations omitted.)).

(3) In determining whether an applicant is seeking to claim an unpatentable fundamental principle or a patent eligible application of the fundamental principle, the inquiry is whether the claim preempts substantially all uses of that fundamental principle. *Id.* at 953 "[*(Diamond v. Diehr*, 450 U.S. 175 (1981)] can be understood to suggest that whether a claim is drawn only to a fundamental principle is essentially an inquiry into the scope of that exclusion; i.e., whether the effect of allowing the claim would be to allow the patentee to pre-empt substantially all uses of that fundamental principle. If so, the claim is not drawn to patent-eligible subject matter."); *Bilski*, 545 F.3d at 953-954 (The Supreme Court stated in *Gottschalk v. Benson*, 409 U.S. 63 (1972) that "the patent would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself."). The Federal Circuit stated: "The question before us then is whether Applicants' claim recites a fundamental principle and, if so, whether it would pre-empt substantially all uses of that fundamental principles if allowed." *Bilski*, 545 F.3d at 954.

(4) A "process" is patent eligible if it is tied to a particular machine or apparatus or it transforms a particular article to a different state or thing (machine-or-transformation test). *Id.* at 954 ("The Supreme Court . . . has enunciated a definitive test to determine whether a process claim is tailored narrowly enough to encompass only a

particular application of a fundamental principle rather than to pre-empt the principle itself. A claimed process is surely patent-eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing.").

(5) Under the "tied to a particular machine or apparatus" prong of the machine-or-transformation test, the Federal Circuit stated that a process may "preempt" even though it is performed on a machine. *Id.* at 955 ("Interestingly, *Benson* presents a difficult case under its own test in that the claimed process operated on a machine, a digital computer, but was still held to be patent ineligible subject matter. However, in *Benson*, the limitations tying the process to a computer were not actually limiting because the fundamental principle at issue, a particular algorithm, had no utility other than operating on a digital computer. Thus, the claim's tie to a digital computer did not reduce the pre-emptive footprint of the claim since all uses of the algorithm were still covered by the claim." (Citations and footnote omitted.)); *id.* at 955 n.9 ("[T]he Court relied for its *holding* on its understanding that the claimed process pre-empted all uses of the recited algorithm because its only possible use was on a digital computer."); *id.* at 961 ("First, as illustrated by *Benson* and discussed below, the use of a specific machine or transformation of an article must impose meaningful limits on the claim's scope to impart patent-eligibility."). Although this is *dicta* because *Bilski* did not involve a machine, it restates the Supreme Court test and is useful guidance.

(6) Under the "transformation" prong of the machine-or-transformation test, the Federal Circuit affirmed the distinction of its predecessor

court in *In re Abele*, 684 F.2d 902 (CCPA 1982) that transformation of data representing a "real world" object is patent eligible. In *Abele*, a broad independent claim reciting a process of graphically displaying variances of data from average values, where the claim did not specify any particular type or nature of data, or how or from where the data was obtained or what the data represented, was not patent eligible subject matter, whereas a claim which specified that "said data is X-ray attenuation data produced in a two dimensional field by a computed tomography scanner" was patent eligible. *Bilski*, 545 F.3d at 962-963 ("This data clearly represented physical and tangible objects, namely the structure of bones, organs, and other body tissues. Thus, the transformation of that raw data into a particular visual depiction of a physical object on a display was sufficient to render that more narrowly-claimed process patent-eligible.").

- (7) The *Freeman-Walter-Abele* test is not the proper test to determine patent eligibility. *Id.* at 958-59.
- (8) The machine-or-transformation test, rather than the "useful, concrete and tangible result" inquiry of *State Street* and *Alappat*, 33 F.3d 1526 (Fed. Cir. 1994) (en banc), is the proper test to determine patent eligibility of a "process" claim. *Id.* at 959-60 ("[W]e also conclude that the 'useful, concrete and tangible result' inquiry is inadequate and reaffirm that the machine-or-transformation test outlined by the Supreme Court is the proper test to apply.").
- (9) The Federal Circuit noted that "physical steps" is not the test under § 101. *Id.* at 961 ("In *AT&T*, we rejected a 'physical limitations' test and noted that 'the mere fact that a claimed invention involves

inputting numbers, calculating numbers, outputting numbers, in and of itself, would not render it nonstatutory subject matter. The same reasoning applies when the claim at issue recites fundamental principles other than mathematical algorithms. Thus, the proper inquiry under § 101 is not whether the process claim recites sufficient 'physical steps,' but rather whether the claim meets the machine-or-transformation test." (Citations omitted.)).

(10) Field-of-use limitations, data gathering limitations, and insignificant post-solution activity ("extra-solution activity") are insufficient to convert an algorithm into a patent-eligible process under the machine-or-transformation test. *Id.* at 957 (discussing field-of-use and insignificant post-solution activity); *id.* at 962 ("Second, the involvement of the machine or transformation in the claimed process must not merely be insignificant extra-solution activity."); *id.* at 963 ("This court and our predecessor court have frequently stated that adding a data-gathering step to an algorithm is insufficient to convert that algorithm into a patent-eligible process.").

35 U.S.C. § 112, Second Paragraph

The second paragraph of 35 U.S.C. § 112 requires claims to set out and circumscribe a particular area with a reasonable degree of precision and particularity. *In re Johnson*, 558 F.2d 1008, 1015 (CCPA 1977). In making this determination, the definiteness of the language employed in the claims must be analyzed, not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be

interpreted by one possessing the ordinary level of skill in the pertinent art. *Id.*

The Examiner's focus during examination of claims for compliance with the requirement for definiteness of 35 U.S.C. § 112, second paragraph, is whether the claims meet the threshold requirements of clarity and precision, not whether more suitable language or modes of expression are available. Some latitude in the manner of expression and the aptness of terms is permitted even though the claim language is not as precise as the examiner might desire. If the scope of the invention sought to be patented cannot be determined from the language of the claims with a reasonable degree of certainty, a rejection of the claims under 35 U.S.C. § 112, second paragraph, is appropriate.

35 U.S.C. § 102

"[A]nticipation of a claim under § 102 can be found only if the prior art reference discloses every element of the claim" *In re King*, 801 F.2d 1324, 1326 (Fed. Cir. 1986) (citing *Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 1457 (Fed. Cir. 1984)). "[A]bsence from the reference of any claimed element negates anticipation." *Kloster Speedsteel AB v. Crucible, Inc.*, 793 F.2d 1565, 1571 (Fed. Cir. 1986).

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros., Inc. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). Analysis of whether a claim is patentable over the prior art under 35 U.S.C. § 102 begins with a determination of the

scope of the claim. We determine the scope of the claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). The properly interpreted claim must then be compared with the prior art.

Appellants have the opportunity on appeal to the Board to demonstrate error in the Examiner's position. See *In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006).

In rejecting claims under 35 U.S.C. § 102, “[a] single prior art reference that discloses, either expressly or inherently, each limitation of a claim invalidates that claim by anticipation.” *Perricone v. Medicis Pharm. Corp.*, 432 F.3d 1368, 1375 (Fed. Cir. 2005) (citation omitted).

35 U.S.C. § 103(a)

Section 103 forbids issuance of a patent when “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.”

KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727, 1734 (2007).

In *KSR*, the Supreme Court emphasized "the need for caution in granting a patent based on the combination of elements found in the prior art," and discussed circumstances in which a patent might be determined to be obvious. *Id.* at 1739 (citing *Graham v. John Deere Co.*, 383 U.S. 1, 12 (1966)). The Court reaffirmed principles based on its precedent that "[t]he combination of familiar elements according to known methods is likely to be

obvious when it does no more than yield predictable results." *Id.* The operative question in this "functional approach" is thus "whether the improvement is more than the predictable use of prior art elements according to their established functions." *Id.* at 1740.

The Federal Circuit recently recognized that "[a]n obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a case. Indeed, the common sense of those skilled in the art demonstrates why some combinations would have been obvious where others would not." *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1161 (Fed. Cir. 2007) (citing *KSR*, 127 S. Ct. at 1739). The Federal Circuit relied in part on the fact that Leapfrog had presented no evidence that the inclusion of a reader in the combined device was "uniquely challenging or difficult for one of ordinary skill in the art" or "represented an unobvious step over the prior art." *Id.* at 1162 (citing *KSR*, 127 S. Ct. at 1741).

One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

IV. ANALYSIS

At the outset, we note that in the Appendix to the Appeal Brief various claims are written with Roman numerals preceding the claim limitations wherein the Roman numerals do not start at numeral (1) or (i) and increase sequentially, but start at various starting points which tends to imply preceding unclaimed steps or structures which may be necessary.

Such claim language makes the reader unsure of the scope of the claim and seems to imply there is additional subject matter which is missing.

From our review of the administrative prosecution history, it appears that Appellants have filed an improper copy of the claims under review in this appeal. The correct text of the claim language was filed on August 8, 2005. Rather than remand the application for submission of a corrected Appeal Brief, we will consider the claims as filed August 8, 2005 in our decision.

35 U.S.C. § 102

Considering now the rejections of claims 10 and 12-20 under 35 U.S.C. § 102, we have carefully considered the subject matter defined by these claims. However, for reasons stated *infra* in our new rejection under the second paragraph of Section 112 of Title 35, entered under the provisions of 37 C.F.R. § 41.50(b), no reasonably definite meaning can be ascribed to certain language appearing in the claims. As the court in *In re Wilson*, 424 F.2d 1382, 1385 (CCPA 1970) stated:

[a]ll words in a claim must be considered in judging the patentability of that claim against the prior art. If no reasonably definite meaning can be ascribed to certain terms in the claim, the subject matter does not become obvious --the claim becomes indefinite.

In comparing the claimed subject matter with the applied prior art, it is apparent to us that considerable speculations and assumptions are necessary in order to determine what in fact is being claimed. Since a rejection based on prior art cannot be based on speculations and assumptions, *see In re Steele*, 305 F.2d 859, 862 (CCPA 1962), we are constrained to reverse, pro forma, the Examiner's rejections of claims 10 and 12 through 17 under 35

U.S.C. § 102. We hasten to add that this is a procedural reversal rather than one based upon the merits of the Section 102 rejections.

With respect to independent claims 18 and 19, we find that the teachings of the Kirsch reference do not set forth the two-step process where an address is received from or using a web browser to a second web entity and redirecting the web browser to the second web entity. Therefore, the Examiner has not shown a sufficient initial showing that the Kirsch reference teaches invention as set forth in the claims 18, 19, and dependent claim 20 under 35 U.S.C. § 102. Therefore, we cannot sustain the rejection of claims 18, 19, and dependent claim 20.

35 U.S.C. § 103

With respect to independent claim 1, we interpret step (ii) as two separate steps. First, "forwarding an address to a second web-entity to the redirection server from a web browser," and second, that the redirection server "redirects the web browser to a second web-entity." The teachings of the Kirsch reference do not set forth nor do they fairly suggest this two-step process of forwarding an address to a second web entity to a redirection server and the redirection server redirecting the web browser to the second web entity. Therefore, the Examiner has not shown a sufficient initial showing that the Kirsch reference teaches the invention as set forth in claim 1 under 35 U.S.C. § 103. Therefore, we cannot sustain the rejection of claim 1.

With respect to independent claims 18 and 19 under 35 U.S.C. § 103, we again find the teachings of Kirsch do not teach or fairly suggest the two

steps of receiving information from a web browser and redirecting the web browser to the web entity/ redirection server.

With respect to independent claim 19, we note that the Examiner includes independent claim 19 in the introductory paragraph and setting forth the grounds of the rejection, but the Examiner does not expressly address the limitations set forth in independent claim 19 with respect to 35 U.S.C. § 102. The claim expressly states accessing the information receiver using the web browser and automatically redirecting the web browser to the redirection server. From our review of the teachings of Kirsch and specifically those portions identified on page 8 of the Answer, we agree with Appellants that Kirsch does not automatically redirect the web browser to the Redirection server. Furthermore the Examiner merely concludes that claims 19 and 20 are unpatentable over the combination of teachings of Kirsch and Narendran, but does not identify any teachings in Narendran that are relied upon in the discussion. Furthermore, independent claim 19 does not include any limitation directed to a plurality of second web entities as discussed in paragraph 9 on page 5 of the Answer.

NEW GROUNDS OF REJECTION

35 U.S.C. § 112, SECOND PARAGRAPH

With respect to independent claims 10 and 15 pursuant to our authority under 37 C.F.R. § 41.50(b), we enter a new grounds of rejection under 35 U.S.C. § 112, second paragraph. From our review of independent claims 10 and 15 and their corresponding dependent claims, we find claims 10 and 15 do not particularly point out and distinctly claim Appellants' invention wherein it is unclear as to the scope of these claims.

From our review of the claims when read in view of Appellants' Specification, we are unable to determine what structure of a web-based information system is arranged to provide items of information for receipt by an information receiver in claim 10. We are unsure what structure would correspond to the claimed "an input arranged to receive instructions from a web-browser such that an item of information from a database may be accessed and selected; said web-browser being separate from said web-based information system and said information receiver." Additionally, we are unsure what structure would correspond to the claimed "an output arranged to forward a pre-specified address of a redirection server together with an item of information accessed from the database to the web-browser; such that said web-based information system has no information about the information receiver."

Additionally, Appellants' Summary of the Claimed Invention has not identified any specific structure which would correspond to the claimed "input" and "output." Since we find no specific device with which to carry out the broadly recited function, we cannot determine the metes and bounds of independent claims 10 and 15 with which to provide a meaningful evaluation of the propriety of the prior art rejection.

The claim limitations set forth in independent claim 10 and independent claim 15 are generally recited to set forth limitations which are defined by their functional characteristics rather than any structural or operational characteristics. Therefore, independent claims 10 and 15 are more like "means plus function" format claims, but they do not clearly set forth a "means for..." or "step for..." to carry out the recited functions.

With respect to independent claim 12, we enter a new grounds of rejection under 37 C.F.R. § 41.50(b) under 35 U.S.C. § 112, second paragraph. We find independent claim 12 does not particularly point out and distinctly claim Appellants' invention wherein while drafted in terms of a method, it contains similar limitations to those found in claims 10 and 15 which we find to be unclear. Furthermore, we additionally find it unclear what the "information receiver" is deemed to be.

Therefore, we are unable to determine the metes and bounds of independent claims 10, 12, and 15 and their dependent claims 11, 13, 14, 16, and 17.

A further problem in determining the metes and bounds of dependent claims 13 and 14 pertains to the fact that both claims have preambles directed to a communication network comprising a web based information system of independent claim 10. These two dependent claims do not further limit their base independent claim 10, nor do we find that claims 13 and 14 are sufficiently clear as to set forth the metes and bounds as separate independent claims since a network would generally require multiple units wherein the claims do not recite multiple units in independent claim 10. Therefore, we cannot adequately determine the scope of the claims to apply the prior art rejection thereto.

35 U.S.C. § 101

Pursuant to our authority under 37 C.F.R. § 41.50(b), we enter a rejection under 35 U.S.C. § 101 wherein independent claim 18 is not directed to statutory subject matter. With respect to independent claim 18, we find the claimed computer program for controlling a Web server in order

to redirect a web browser to be directed to the abstraction of a computer program per se which is not embodied as a machine or article of manufacture with which to carry out the claimed functions. Therefore, the claim does not fall within one of the statutory classes of invention under 35 U.S.C. § 101 to apply the machine-or-transformation test reaffirmed and set forth in *Bilski*.

37 C.F.R. § 41.50(b)

37 C.F.R. § 41.50(b) provides that, “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that the Appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new grounds of rejection to avoid termination of proceedings (37 C.F.R. § 1.197 (b)) as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

V. CONCLUSION

For the aforementioned reasons, the Examiner has not shown a prima facie case of anticipation or obviousness of the instant claimed invention. Furthermore, we find Appellants' claims do not particularly point out and distinctly claim Appellants' invention and have applied a new ground of

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rejection under 35 U.S.C. § 112, second paragraph. Furthermore, we have rejected independent claim 18 as directed to non-statutory subject matter under 35 U.S.C. § 101.

VI. ORDER

We reverse the anticipation rejection of claims 10 and 12-20, and the obviousness rejections of claims 1-3, 5-9, 11, 16, 19 and 20. We enter new grounds of rejections with respect to claims 10-18.

REVERSED
37 C.F.R. § 41.50 (b)

msc

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